IN THE

Supreme Court of the United States

October Term 1966.

No. 310

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Respondents,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, etc., *et al.*,

Defendants-Petitioners.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE RECORD COMPANY, INC., New York, N. Y. 10007—212 RE 2-8078—1967

Table of Contents.

Table of Cases.

OTHER AUTHORITIES.

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Plaintiffs-respondents pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated January 30, 1967. They do not, of course, find fault with said Court's condemnation of Union price-fixing.

Opinions Below.

The opinion of the District Court is reported in 241 F. Supp. 865 (S. D. N. Y. 1965). The opinion of the Court of Appeals for the Second Circuit is reported in 372 F. 2d 155 (1967).

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered January 30, 1967. The jurisdiction of this Court is invoked under 28 U. S. C.

Questions Presented.

1. Whether defendant-Unions violated Federal antitrust laws by combining with *non-labor groups* (many classes of *employers, e. g.,* orchestra-leader-employers who comply with defendants' regulations, hotels, nightclubs, restaurants, caterers, booking agents, theatre owners, dance-hall operators, recording companies, radio stations, TV stations)[1] for the purpose or with the effect of (i) fixing prices, (ii) eliminating or suppressing competition and restraining trade, (iii) imposing unreasonable restraints on interstate commerce, and (iv) engaging in monopolistic practices in the field of musical entertainment in the United States?

2. Whether said Unions' "representation of orchestra leaders, whom * * * [the Court of Appeals] * * * has held to be employers in the field under consideration,"[2] justifies said Unions' unilateral imposition of: (i) AFM booking agents' licensing system; (ii) Union employment quotas; (iii) Union restrictions on interstate commerce; (iv) Union suppression of competition; and (v) other Union monopolistic practices, such as the AFM "arbitration; system (AFM bylaws Article 9); all enforced in combination with *non-labor groups*?

3. Whether, under the *Allen-Bradley* doctrine,* Union contracts and bylaws constitute forms of *combination* (to effect commercial restraints upon plaintiffs) between Unions and *non-labor groups* in these cases?

4. For the purpose of applying the *Allen-Bradley* doctrine is it significant that the commercial restraints *were initially instituted by Unions,* though immediately thereafter (i) acquiesced in by many orchestra-leader-*em-*

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[1] Hereinafter the words, "*non-labor groups,*" refers to the categories named in this parenthesis.

[2] Decision below: 372 F. 2d 155, at 165.

* *Allen-Bradley Co. v. Local No. 3,* 325 U. S. 797 (1945).

ployers and other *non-labor groups;* and (ii) enforced by *combinations* between Unions and *non-labor groups?*

5. For the purpose of applying the *Allen-Bradley* doctrine, may *employers* like plaintiffs be placed in a "labor group"?

6. Whether the fact that many orchestra leaders (other than plaintiffs) are variously involved in the musical industry (*cf.* the "spectrum"[3] described by dissenting Judge Friendly) limits the rights of plaintiffs (under antitrust laws) who are professional leaders and who do not work as employee musicians?

7. Whether certain unilateral Union practices, enforced or maintained in combination with *non-labor groups,* (e. *g.,* fixing closed shops, wage scales, minimum employment quotas, working conditions and coercion of union membership on employers) may be regarded as antitrust law violations without first obtaining an NLRB decision that they are unfair labor practices under the NLRA (p. 167)?

8. Whether the principle that "a closed shop dispute—concerns a 'term or condition of employment'" (p. 167) has relevance here to exempt Unions from liability under the Sherman Act, where there is no bargaining and where the closed shop, enforced by Unions in combination with *non-labor groups,* manifestly violates the national policy declared by the NLRA and therefore constitutes a predatory practice?

9. Whether the rule "that a music purchaser * * * cannot refuse to bargain on a union's demand that only musician-employees who belong to the local union be

[3] 372 F. 2d 155 at 168 and 169. Judge Friendly also relied on the *sui generis* character of employment—an employment which is often sporadic, such as one encounters in such industries as construction, entertainment, house-painting, restaurant, catering, etc. (Hereinafter references like "(p. 167)" refer to pages of the Court of Appeals decision cited, in this footnote.)

employed" (p. 167) has any relevance to exempt Unions here from antitrust law liability where (i) admittedly there is no bargaining with music purchasers; and (ii) the Unions enforce prices, wages and working conditions in combination with *non-labor groups?*

10. Whether the fact that travel restrictions and employment quotas are usually mandatory subjects of bargaining is relevant here (as the Court below held), despite the undisputed fact that defendant Unions systematically refuse to bargain or deal with plaintiffs and other leader-employers (pp. 165-166)?

11. Whether the fact that "the national policy demands that the parties [to collective bargaining] be permitted freely to reach agreement on terms and conditions directly affecting the working man" (p. 164) has application here to exempt Unions from antitrust law violations, since Unions systematically refuse to bargain with orchestra leaders as employers?

12. In view of the *combination* between defendants-petitioners and businessmen, is defendant Unions' refusal to deal with plaintiffs as employers of sidemen, whom Unions purport to represent, an infringement of the Sherman Act, whether such refusal is or is not, according to NLRB categories, an unfair labor practice (p. 165)?

13. Whether *Hunt v. Crumboch,* 325 U. S. 821 (1944), which antedated the Taft-Hartley Act (1947), is any longer a valid precedent (as the Court of Appeals held), since that Act establishes the principle that a labor union (even in the absence of a *conspiracy* or *combination* with businessmen) which purports to represent an employer's employees, must deal with such employer (p. 167)?

14. Whether, as the Court below held, the involved "exertion of pressure on orchestra leaders to join the Union reflects a legitimate union concern for the closed shop" (p. 168)?

15. Since, as the Court of Appeals stated, application of the Sherman Act "involves a balancing of conflicting Congressional policies," can the Norris-LaGuardia Act be said to take *all* "labor disputes" outside the reach of the Sherman Act, thus indiscriminately providing unions with a blanket exemption, or only *some* disputes, *i. e.*, those where the union (unlike the Unions here involved) does not *combine* with *non-labor groups* to fix prices, suppress competition and to impose other commercial restraints?

16. Whether the defendant Unions' travel restrictions and peculiar (since they include *employers*) *employment quotas,* enforced in combination with *non-labor groups,* are immune from attack under the Norris-LaGuardia Act?

17. Whether the *purpose* of such *combination* must be "to create a local business monopoly" or whether the *result* of such a *combination* (between Unions and *non-labor groups*) is sufficient to withdraw the shield of Norris-LaGuardia and to create liability under the Sherman Act?

18. Whether a *conspiracy* must be shown or whether a *combination* (by agreements or otherwise) with *non-labor groups* to fix prices, to suppress competition and to impose other commercial restraints is sufficient to cause a case "to fall outside the protection of the definition of 'labor dispute' in §13 of the Norris-LaGuardia Act"?

19. Whether defendants-petitioners' establishment of employment quotas was not tantamount to price-fixing, since the orchestra-leader-employer himself is reckoned

as one of the persons to be counted in the quotas which defendants-petitioners enforce in combination with non-labor groups?[4]

20. Whether defendants-petitioners' regimentation of booking agents, licensed by Federation and working in *combination* with the Federation and its Locals, is not another aspect of defendants-petitioners' price-fixing and other monopolistic conduct in combination with *non-labor groups?*

21. Whether defendants-petitioners' bylaw requiring all leader-employers to use the "Form B" contract, unilaterally prepared by the Federation and enforced in combination with *non-labor groups,* violates antitrust laws not only because said contract is a tool for price-fixing but also because it is, itself, an important means for Unions' many monopolistic practices, enforced in combination with *non-labor groups?*

22. Whether defendants-petitioners' unilateral establishment (by bylaws and other mandated practices) of numerous travel restrictions, and their enforcement in *combination* with *non-labor groups,* constitute, cumulatively, unreasonable burdens on interstate commerce?

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[4] The unilateral mandate of minimum employment quotas by defendant Unions necessarily increases defendant-fixed prices; because, under the regulations contained in the Union "minimum booklets," the orchestra leader himself is regarded as one of the musicians to be counted in each minimum quota. Plaintiff Carroll's testimony shows that, in 1950, Local 802 had fixed minimum quotas of employment for less than 20 hotel rooms in New York City. By 1963, Local 802 had unilaterally fixed minimum employment quotas for some 1,700 rooms in hotels, nightclubs and catering establishments in its jurisdiction [715-718]. *E. g.,* the Grand Ballroom of the Waldorf Astoria requires for certain functions a minimum of 12 musicians. When a leader-employer leads his orchestra, he is regarded as one of these twelve. Therefore, the minimum, *leader's compensation* (required by union rules for the orchestra leader's appearance) has to be included in the minimum price charged to the client. The leader-employer may not waive this item of Union-decreed minimum profit for leaders (Plaintiffs' Exhibit 241).

23. Whether the Unions' and Trial Court's bald assertion of plaintiffs' "job competition" with Union subleaders, unsupported by any specific record evidence of actual instances of such competition, can make *employers* like plaintiffs "proper subjects for union membership"?

24. Whether as a matter of law leader-*employers* like plaintiffs can fairly be said to be in competition with their own employees?

25. Whether Unions' price-fixing and other monopolistic practices in combination with *non-labor groups* may be excused on the alleged ground that there is "job or wage competition or any other economic relationship" between leader-employers and their employees?

26. Whether orchestra-leader-*employers,* like plaintiffs, should be permitted to be or to remain members of the Unions which represent their employees?

27. Is there a class of orchestra-leader-employers within the meaning of Rule 23 FRCP?

Statutes Involved.

The statutory provisions involved were the Sherman Anti-Trust Act (28 Stat. 209, 15 U. S. C. §1) and the Norris-LaGuardia Act (47 Stat. 90, 29 U. S. C. §101). They are, so far as relevant, reproduced in the Appendix A and Appendix B.

Statement.

Petitioners-defendants (hereinafter sometimes called "Defendant-Unions" or "Unions") have over a period of many years displayed unparalled power.[5]

Union Conduct Depicted by Court of Appeals.

Almost all musicians (leaders, sidemen, subleaders) in the United States are AFM members (*Carroll v. AFM*, 372 F. 2d 155, 158). Local 802 has virtual control over the industry in the New York City area (p. 158).[6] All Union-mandated engagement ("Form B") contracts dub the purchaser of the music as "employer" (p. 158), even when the orchestra leader is the true employer (p. 159). The club date field, which is the largest field in the musical industry (p. 158), is not subjected to collective bargaining, but to Union regulations (p. 159). Considerable hiring

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[5] In his book entitled "The Musicians and Petrillo" (Bookman Associates, Inc., New York, 1953), Robert D. Leiter wrote:

"The power of the union is evident not only in the internal affairs of the organization but in the union's relations with employers. The American Federation of Musicians exercises complete control over professional musicians in the United States. A musician who is not in the union normally cannot earn a livelihood by playing an instrument. The union frequently has been able to impose terms of employment upon employers without negotiation. Some employers and some agents have been required to secure licenses from the union before being able to hire or deal with musicians (Preface, p. 7).

* * *

"* * * even at the turn of the century the union [A. F. of M.] was manifesting signs of unilateral action in fixing conditions of employment which have reappeared again and again throughout its history. * * * this union has tended to lay down the law to employers without requesting their acquiesence and without consulting them (p. 24).

* * *

"Local 802 * * * does not negotiate with all who desire to hire musicians. Instead it sets the price in advance and an employer must pay the scale fixed by the Local or go without musicians. In dealing with the important and organized employers the union does not bargain collectively" (p. 100).

[6] Pages of the Court of Appeals' decision hereinafter take this form: (p. 158); pages of the Stenographer's Minutes of the trial appear simply as numbers in parentheses: (158).

is done through the Union hiring-hall (p. 159). Many engagements are obtained through booking agents (p. 159), licensed and minutely regulated by AFM (p. 159). Union members must use only booking agents so licensed (p. 159). Defendants exercise "rigid and monolithic control over much of the music industry" (p. 159), and everywhere enforce closed shops (p. 160). Orchestra-leader-employers are coerced into the same Unions (p. 160) with their employees. Local 802 makes it a bylaw [Art. IV, §4(h)] violation "To perform in or with a band or orchestra which is led or conducted by a nonmember of the union or in which a nonmember plays an instrument or performs any other work of a musician" (p. 160).

One Union weapon to compel conformity with AFM rules, even by non-members, is the "Unfair List" (p. 160). Local 802 "regulates the club date field in great detail" (p. 160). Its "Price Lists" unilaterally (p. 160) fix minimum prices, wage scales and working conditions. Leader-employers, the public, all purchasers of music, must comply (p. 160). Price Lists, decreeing that orchestra leaders are "employees" of the purchaser, are unilateral codifications by Local 802's Executive Board of prices, employment quotas and wage scales. They regiment "with considerable specificity" all details of musical engagements (p. 160); set price floors for clients and leaders and minimum profits for leaders on single and steady engagements (p. 160). They are union by-laws obligating all members (p. 160). Collective bargaining with leader-employers or their clients (concerning the wage scales and other regulations) is *verboten*[7] (p. 160). Enforcement of Union regulations "is achieved by requiring orchestra leaders to report and by insistence upon the use of the Federation's 'Form B' contract" (pp.

[7] Thus, in the club date field, which comprises most of the single engagements and in many steady engagements, terms and conditions of employment are determined by unilateral Union action (p. 93; 160).

160-61). That printed Union contract is the only one permitted (p. 160), except that somehow Local 802 "has relaxed these [Federation] rules for single engagements" in some respects (p. 161).* Such contract forms, executed by leader-employer and client, must be "submitted for approval to the Local Union before the performance" (p. 161). Union "business representatives" attend performances to check compliance with Union regulations (p. 161).

Many additional regulations for traveling engagements protect local musicians (including leader-*employers*) from competition with traveling musicians (p. 161). Up to January 1, 1964, the Unions systematically enforced a "10% traveling surcharge," which since 1947 violated §302 of the Taft-Hartley Act (p. 161). Since 1964, a Union "price differential plan" has been imposed on traveling leaders: a percentage of the "minimum price of either * * * home local or of the local in whose territory it [traveling orchestra] is playing, whichever is greater" (p. 161). A leader-employer who travels outside his Local's jurisdiction to play an engagement is unilaterally barred from accepting any single engagement until his steady engagement is completed; and at the end of an initial steady engagement he is also barred from accepting another steady engagement in the invaded Local's jurisdiction (p. 161).

The "Federation inhibits traveling" across state lines (p. 161). There are unilateral Union restrictions on importations of musicians by a leader (p. 161). Members who transfer from one Local to another are limited by Union rules forbidding competition in the new area for three months (p. 161). These AFM regulations protect Local members (including leader-employers) from competition with other leader-employers when the latter invade the jurisdiction or when they are transferred to

* See Appendix C.

another Local (p. 161). Local 802 also forbids acceptance of musical engagements from caterers (168). Booking agents may not deal with or act for non-union musicians or leaders (168).[8]

Additional Union Practices.

The foregoing, as well as other Union practices, cumulatively build up into extensive monopolistic activity, all *in combination with non-labor groups.*

The 10% traveling surcharge provided AFM with some 63% of all its revenues (Plaintiffs' Exhibit 200, p. 32). Plaintiffs' Exhibit 200 shows that AFM in 1962-63 exacted from traveling *orchestra leaders* $1,428,538. An equal amount was exacted from the same leader-employers for the treasuries of AFM Locals (Plaintiffs' Exhibit 162, p. 103, §7).[9]

Orchestra leaders are forbidden by AFM bylaws to obtain loans for their own businesses as leaders without permission of the AFM president (Article 25, §23, AFM Bylaws)! Investments in shows by orchestra leaders are Union regulated (289). Booking agents are required (District Court's Findings of Fact Nos. 117-18) to enforce AFM bylaws, including minimum prices. Failure to do so jeopardizes their licenses and their businesses, since AFM retains the power to revoke such licenses without notice and without reason (AFM Bylaws, Article 25).

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[8] In spite of its impressive list of commercial restraints imposed by defendant Unions (in combination with non-labor groups), the Court of Appeals and the District Court erroneously regarded plaintiffs' charge of *monopoly* as confined to Unions' *closed shop!*

[9] AFM President Kenin recognized the inequity of this burden on leader-employers; he conceded that "orchestra leaders, our friends, dedicated and faithful members of the Federation and good trade unionists—have been saying for many years that they should not be called upon to bear such a disproportionate weight of the Federation's financial needs * * *."

AFM and *all* its Locals have price lists (17). Federation's price lists were for many years included in its bylaws (Plaintiffs' Exhibit 162). Most leader-employers and bookers combine with defendant Unions to enforce these price lists (8, 89-90, 272, 293, 374, 449, 522-23, 557, 996, 1102, 1133, 1716, 2567-68, 3653, 3655, 3668). But prices are not uniform from Local to Local. This gives rise to many advantages and disadvantages for leader-employers, depending on their Local membership. E. g., consider Emil Paolucci, an orchestra leader-*employer* (728ff) and member of Local 802 in New York City, of Local 38 (of which he is president[10]) in Larchmont and of Local 402 in Yonkers. The minimum prices fixed by Locals 38 and 402 in their "Price Lists" are substantially lower than those required by Local 802 "Price List" (746-50). When Paolucci plays in Local 38's jurisdiction, he is not bound (because of his dual membership) by Local 802's bylaws fixing higher prices. He is permitted to charge his clients the lower minimum prices of Local 38, even though he is a member of Local 802 (which has the highest minimum prices in the industry). But plaintiff Cutler, who is a member of Local 802 (2228) and not a member of Local 38, must charge higher (Local 802's) prices for engagements played by his orchestras in the jurisdiction of Local 38 (2464-74). The same sort of union-regulated price discrimination affects Mr. Cutler when he plays in Yonkers or in New Jersey, where (to select just one of the eleven price ingredients [Plaintiffs' Exhibit 388] legislated by AFM Locals) the minimum New Jersey rate of wages was $20 for four hours (the applicable minimum time unilaterally prescribed by involved AFM Locals), while the Local 802 rate was $32, (without adding travel expenses and other price elements

[10] This is a violation of the Labor Law of the State of New York, Article 20A, §721(1)(a); and it is incompatible with the national labor policy prescribed in NLRA.

mandated by Local 802 for leaders who take their orchestras from New York City to Newark). The net result was that Cutler lost many clients in Westchester County, New Jersey and Washington, D. C. (2464-74).

Rates negotiated with recording companies apply to orchestra leaders not privy to the negotiation (58-60). AFM president testified that Article 26, AFM by-laws, pertaining to traveling military, concert and brass bands apply to all members, as do Article 27 relating to fairs and circuses (64-66) and many other articles in AFM bylaws. The TV film contract, originally negotiated with three large companies, must later be signed by everybody else in the business (74). The same is true of the contract negotiated with advertising agencies (79-80). The transcription contract (Defendants' Exhibit BV), negotiated with a few transcription companies, must be signed by all others (81). *All of these rates become the obligations of leader-employers, who were not party to their negotiation.*

Disputes involving traveling bands, which are hampered by many Union rules (146, 163-66, 145, 280-87, 948-49), must be settled by the AFM Executive Board (118-19), and, under Article 9 of its bylaws, AFM has a stake (2569) in the disputes which it "arbitrates" (119-21, 3538). Local 802 prices and rates obligate traveling orchestras which visit New York (145). All contracts for engagements negotiated by leader-employers with their clients must incorporate AFM and Local rules and must be filed with and approved by the Local having jurisdiction (166-67, 214, 656-62, 672-73). AFM issues licenses to companies which desire to make recordings and they may not make them without such licenses (169-70). Under Article 2, §5(P), AFM Bylaws, the International Executive Board has supervision over all prices, but only to raise them (194-96).

The president of Local 802 testified that the labor contracts negotiated by Local 802 with hotels, night clubs and restaurants obligate (3581) orchestra leaders, who never participate in such negotiation (237, 238, 277-78, 892). Local 802 arbitrarily and unilaterally fixes "mileage" fees for members who travel outside its judisdiction or across state lines. Mileage fees must be included in the price paid by clients (266; Plaintiffs' Exhibit 388; 2549-51). If an orchestra leader takes his orchestra to the West Coast and plays three or four engagements for different purchasers in that area, he must charge *each purchaser* the mandated mileage fee (267-68, 1664-66).

Union delegates have free access to hotels, nightclubs and restaurants to check whether leader-employers (not parties to the involved or any contracts) are charging prices and paying wages prescribed by the hotel-restaurant-nightclub contracts (295). Minimum quotas, fixed unilaterally by Union officials, are always urged upon guests by hotels, nightclubs, restaurants and caterers. Purchasers of music are warned of Union reprisals unless such quotas are honored (457; 464-5; 469-73; 996; 1001; 1601; 2205-6; 2215-6; 2338-40; 2348; 2404-5; 2677-8). Leader-employers, who obtain engagements through bookers, use Federation-licensed booking agents only (130-32) and comply with Union bylaws, including those which fix prices (8; 557; 536-38; 546-51); since most leaders, who earn a living in whole or in part from the musical industry, must belong to AFM (84). There is no competition between orchestra leaders at prices below those fixed by AFM and its locals (89-90; 146; 293; 2510; 3653-55). Practice in the musical industry invariably follows AFM bylaws (151-52). A non-union leader-employer cannot obtain employee musicians (165) and is blacklisted or boycotted. Leader-employers freely admit that they always follow Union regulations respecting prices, closed shops, booking agents, etc. (374; 449; 1102-05; 1362; 2510; 3512

ff.; 3843-45). Hotels, nightclubs and restaurants always collaborate by insisting that patrons observe Union minimums, prices, and closed-shop rules (895; 2086; 2205-08; 2215-16; 2377; 3151-52; 2932). Caterers also combine with defendant Unions by enforcing closed shops, minimums, prices and wage scales (772-78; 2348; 2357; 2404-05; 2677-78). Booking agents comply meticulously with Unions' unilateral regulations pertaining to prices, closed shop, minimums, etc. (996-1001; 522-23; 1102-05; 1133; 2505-06). So do arrangers (204; 1839-40), recording companies (1469; 58-60), "Class C" establishments which are nightclubs, bars, *et al., not* covered by the hotel contract (689; 1267; 1278-79; 1292; 1692; 3493-97; 3571-74), and TV chains (2314-15; 2779). The City of New York also collaborates with defendant Unions in a similar fashion (1581; 1601).

In the recording, TV and radio industries, usual practice or the applicable "Form B" contract (i) enforces designation of orchestra-leader-employers as "employees" (3655) and (ii) requires the recording company, television company, *et al.* (which are not the employers) to pay wages to the leader-employer's sidemen, deducting from the lump sum (royalties) payable to the leader-employer such wages, withholding taxes, etc. (1533-34; 430-32; 1067; 3596-97; 1089; 1491-92; 1536-42; 2699-2700; 3512; 3551; 1198-1203).

Some orchestra leaders are union officials[11] (927; 728-31; 976-80; 141), having access to the business contracts of their competitors (755-56).

[11] The New York State Labor Law, Article 20-A, Section 723(1)(a), provides: "Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization: (a) to have, directly or indirectly, any financial interest in any business or transaction of * * * an employer whose employees his labor organization represents * * *."

Leader-employers like plaintiffs do not bid against any of their employees for engagements (1976; 2154; 2510-11; 2522; 2567-68; 2570; 3871). Some leader-employers approve Unions' price-fixing regulations as their protection against competition (1253-54; 3659-60; 274; 1706; 2060; 2472-75; 2593-95). Local 802 has even tried to regulate competition (3728) between two hotels by means of its unilateral minimum employment quotas (3240-45) and between kosher and non-kosher "places" (3620).

Although leader-employers are forced into AFM unions, their interests are different from those of employee members (508; 2498; 3240; 3657; 3659).

A leader-employer is bound by the recording company labor contract; and even though he does not take part in its negotiation (58-62), he is saddled with the expense of employer payroll taxes and contributions (despite the fact that the contract calls him an "employee"). All AFM bylaws which apply non-negotiated or negotiated prices and wages obligate leader-employers (65-70) with whom the Unions do not deal. Non-members on TV would be boycotted (161). No leader's engagement contract will be approved unless he is in good standing (298). Places where music is performed are classified by the Local 802 Executive Board without negotiation (1249); and Union prices, wages, and other conditions automatically attach to the particular classification without negotiation (1258-59), depending on the Local 802 Executive Board's estimate of capacity to pay (1258).

Imposition by Unions of minimum employment quotas has caused much unemployment and many decreases in live-music engagements (1722-23; 1976-78; 2060-66; 2121-24). So have Unions' unilateral wage increases (2589; 2593-95).

AFM Unions suppress competition in numerous ways (2435): Unilaterally they forbid leader-employers to con-

tract for package deals (3246; 3696); they bar caterers from hiring musicians (3248-50); they segregate Negro locals from white locals, each with different price lists (3645); they forbid arrangers from leading orchestras (3284); Local 802 signs a labor contract with a theatre-landlord (Shubert Brothers) to cover the musician employees of *third parties* (3284). Members on steady engagements may not play a single engagement (3318-20); and Unions impose what are in effect *standby musicians* on theatre productions to the point where some employee muscians only come in to collect their pay checks (3366). There are other restraints of trade (3321-23).

All leader-employers who are expelled from membership are published as "erased" by AFM, which encourages its locals to do likewise (3390). Such publication facilitates boycotting.

There are 400-500 "Class C" establishments in Local 802's jurisdiction where the leader-employer signs a "Form B" contract in order to perform. Thus he makes himself liable for terms "negotiated" solely between the local and the owner of the establishment or, more usually, unilaterally imposed by Local 802 officials. (3572-73).

There is a unilaterally imposed wage and price differential for "augmented bands" (3729-31). During recording sessions, orchestra-leader-employers are in control (3857; 1078-1080; 1198-1203) but Unions exaggerate the control of the A & R man for their own purposes.

The Unions have an arsenal of sanctions to enforce their bylaws against members (and in some cases non-members); e. g., fines up to $5,000; suspensions; expulsions; unfair lists; strikes; boycotts (AFM Bylaws, Plaintiffs' Exhibit 162, *passim*).

Yet, with all this Union regimentation, use of live music decreases each year (3579). Union membership has not increased since 1953 (3270). Staff personnel in TV and

radio decrease each year (2300-02). Engagements are priced out of the market more and more (Plaintiffs' Exhibit 65; 1723; 1840-41; 1953-58A; 1950-51; 1980-2000; 2121; 2238; 2589; 2593; 2695). And the public is asked to pay higher prices dictated by Union bureaucrats who systematically reject the checks implicit in collective bargaining.

Reasons for Granting the Writ.

1. As the dissenting opinion below points out, the "line between those forms of union activity which are permissible and those that run afoul of the antitrust laws is anything but bright." The instant cases, ranging as they do over many forms of restrictive Union activity in combination with many non-labor groups, provide an apt occasion for examination and better delineation[12] of the "line" in question.

2. The Unions here acted in combination with many businessmen and employers; especially leader-employers who, as Union members, combined with Unions to impose restraints on commercial competition in the musical industry. The Unions aided "non-labor groups to create business monopolies and to control the marketing of * * * services" (*Allen-Bradley Co. v. Local No. 3*, 325 U. S.

[12] The need for an authoritative clarification of the *Allen-Bradley* (*Allen-Bradley Co. v. Local 3*, 325 U. S. 795) rule and for a review of the many conflicting and confusing cases applying it in different circuits is attested by many significant law review articles. Cox, *Accommodation of the Norris-LaGuardia Act to other Federal Statutes*, 72 Harv. L. Rev. 354, 369ff; Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. of Chicago L. Rev. 659; Handler, *Recent Antitrust Developments—1965*, 40 N. Y. U. L. Rev. 823; Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L. Rev. 14; Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 Pa. L. Rev. 252 (1955); Barnes, Goldberg & Muller, *Unions and the Antitrust Laws*, 7 Lab. L. J. 133, 178, 186 (1956); Bernhardt, *The Allen-Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 Pa. L. Rev. 1094 (1962); Comment, *Labor's Antitrust Exemption after Pennington and Jewel Tea*, 66 Col. L. Rev. 742 (1966); Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 Yale L. Rev. 59 (1965).

797, 809). Orchestra-leader-employers who want no competition at prices below those fixed as minima by the Unions welcome and benefit from Union aid (8; 89-90; 272; 293; 374; 449; 522-23; 557; 996; 1102; 1133; 1716; 2567-68; 3653; 3655; 3668). Defendant Unions thus "* * * participated with a combination of businessmen [orchestra-leader-employers united in the Unions] who [because of the Unions' suppression of competition at prices below those fixed by Unions] had a complete power to eliminate all competition among themselves and to prevent competition from others * * *" (*Allen-Bradley* at p. 809). The Unions did not act "alone" but "in combination with business groups" (*ibid.*, p. 810), *i. e.*, with the groups of leader-employers who belonged to Unions and obeyed their price lists. "A business monopoly [by and for leader-employers protected from competition by the Unions' price floors] is no less such because a union participates [by fixing such price floors and by enforcing the rule of 'No competition below Union prices'] and such participation is in violation of the Act" (*ibid.*, p. 811). A union forfeits its exemption from the antitrust laws "when it is clearly shown that it has agreed with one set of employers [*e. g.*, owners of hotels, nightclubs and restaurants] to impose a certain wage scale on other bargaining units" (*United Mine Workers v. Pennington*, 381 U. S. 657, 665); *e. g.*, plaintiffs' and other leader-employers' employees (237-38; 277-78; 892; 3581). The policy of the antitrust laws is "clearly set" against such employer-union agreements seeking to prescribe labor standards outside the bargaining unit (*ibid.*, 381 U. S. at 672). All this Union activity was "at the behest of or in combination with non-labor groups" (*Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U. S. 676, 689-90). It is therefore not exempt under the Sherman Act. See also: *Columbia River Packers Ass'n v. Hinton*, 315 U. S. 143, 147 (1942); *Teamsters v. Hanke*, 339 U. S. 470 (1950);

Los Angeles Meat & Provision Drivers' Union v. United States, 371 U. S. 94, 102 (1962).

3. There is an equally recognized need for a more practical and principled explication of the diffuse *dictum* at the end of the majority decision in *Los Angeles Meat Drivers Union v. U. S.*, 371 U. S. 94 (1962); since Unions' reliance upon that *dictum* in its *literal* scope is a vehicle for unconscionably expanding (i) the area of unilateral union action *vis-a-vis* employers and (ii) the already distended scope of union exemption from liability under antitrust laws. Meltzer (*Labor Unions, Collective Bargaining and the Antitrust Laws, supra*, at pp. 682 ff.), has an interesting footnote[13] on the *dictum*.

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[13] "* * * The Court's supporting citations, introduced with a '*Cf.*,' were: *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc.*, 311 U. S. 91 (1940); *Bakery & Pastry Drivers v. Wohl*, 315 U. S. 769 (1942); *Local 24, Teamsters Union v. Oliver*, 358 U. S. 283 (1959). The cited cases, although they illustrate the conflict between the interests of unionized employees and those of businessmen-workers performing similar economic functions, are somewhat remote. Thus, it should be noted that the Court in *Lake Valley* intimated that the 'vendors' were functionally 'employees' and noted that they had been so characterized by the plaintiffs. See 311 U. S. at 95, 98. Furthermore, later developments raise questions about the vitality of *Lake Valley*, which was limited by *Hinton v. Columbia River Packers Ass'n*, 117 F. 2d 310, 313 (9th Cir. 1941), *rev'd* 315 U. S. 143, 147 (1942). The Taft-Hartley amendments to the NLRA were designed to limit the situations in which ostensible independent-contractor relationships were characterized as employment relationships. See §2(3) of National Labor Relations Act, 61 Stat. 137 (1947), 29 U. S. C. §152(3) (1958), amending 49 Stat. 450 (1935); House Comm. on Education and Labor, *Labor-Management Relations Act, 1947*, H. R. Rep. 245, 80th Cong., 1st Sess. 18 (1947); *NLRB v. Steinberg*, 182 F. 2d 850 (5th Cir. 1950). Section 8(b)(4)(A), added by 61 Stat. 140 (1947), 29 U. S. C. §158(b)(4)(A) (1958), as amended, 29 U. S. C. §158(b)(4)(A) (Supp. V, 1963), reinforces §2(3) by proscribing union pressures designed to force self-employed persons to join unions. Even if courts in Sherman Act cases were bound to validate concerted activities of businessmen-workers protected by the NLRA, as amended, there would be no warrant in Sherman Act cases for expansion of the protection accorded by the NLRA. It is true that in the *Oliver* case the Court, without passing on the independent-contractor question, invalidated the application of a state antitrust law to minimum rental rates fixed by a collective bargaining agreement. But the Court carefully noted the absence of any claim that federal law had been violated and made it clear that the bargaining process was to be limited by federal standards. See 358 U. S. at 286. Finally, the position in *Lake Valley Farm* that the Norris-LaGuardia Act barred an injunction against Sherman Act violations growing out of labor disputes (311 U. S. at 102-03) was repudiated in *Allen Bradley*. Plainly, the Court's '*Cf.*' carried quite a burden."

4. Despite its wholesome condemnation of Union price-fixing, the ruling below is too tolerant of (i) systematic Union dictatorship over an entire industry wherein subservient non-labor groups are Union vassals; (ii) an unparalleled, unreasonable and unjust aggrandizement of Union power, exercised in combination with non-labor groups; (iii) calculated, extensive and flagrant violations of Federal statutes which provide standards for appraisal of Union conduct toward plaintiffs (and all leader-employers, whether Union members or not); and (iv) artificial defenses and legalistic technicalities deployed by defendant Unions without any consideration of logical or legal consistency. Such tolerance can only aggravate the very problems which this Court tried to solve in *Allen-Bradley*.

5. This Court has several times referred to the crucial distinction between "labor groups" and "non-labor groups." See *United States v. Hutcheson*, 312 U.S. 219 (1941); *Allen-Bradley Co. v. Local 3*, 325 U.S. 797 (1945) and many later cases. However, this Court has never carefully defined these critically important categories. The opinions below demonstrate the need for such definition, which is intimately linked with the aforesaid need for clarification of the *Allen-Bradley* doctrine.

6. The Court below, while verbally applying the doctrine of "accommodation," did not in reality do so. It failed to take into consideration the total vector trust of the Unions' numerous commercial restraints. The extensive and grave antitrust law violations in which defendant Unions engaged for many years should not be excused either by individual extenuation of each violation, as if the others did not exist, nor by an alleged "accommodation" of different statutes which in effect gives unjust or unreasonable primacy to the NLRA or to the Norris-LaGuardia Act, almost without considera-

tion of the competing claims of such statutes as the Taft-Hartley Act, the Landrum Griffin Act and the Sherman Act. The problem of accommodation is, as Professor Cox put it, "that of preserving the freedom of unions from impingement upon their normal activities by the antitrust laws while at the same time preventing those restraints of trade which are so unrelated to normal union functions and so extensive in their effect on market competition as to be unlawful if done by employers" (*Accommodation of the Norris-LaGuardia Act to Other Federal Statutes,* 72 Harv. L. Rev. 354, 369 [1958]). Here, defendant Unions' activities of which plaintiffs complained, are not *normal* union activities.[14] Also, the Union activities are "extensive in their *effect*[15] *on market* competition," and are "unrelated to normal union functions."

7. The exclusive jurisdiction of the NLRB over "unfair labor practices," as technically defined by the courts and the NLRB or as read from that Act while running, should not, for the purposes of the Sherman Act, exculpate Union conduct which, whatever its formal susceptibility to strict characterization as an "unfair labor practice," is lawless, predatory practice. It victimizes the public, employers and employees by commercial restraints and exhibits monopolistic inspiration and efficacy, especially because it is always accompanied by Union combination with non-labor groups. This Court recently wrote in *Vaca v. Sipes* (87 S. Ct. 903, 914-15) " * * * We may assume for present purposes that such a breach of duty by the union is an unfair labor practice * * *. The employees' suit against the employer, however, re-

[14] E. g., Unions' systematic refusal to deal with employers; their unilateral imposition of prices, wages, working conditions; their coercion of employers into AFM membership; their exactions from employers of local taxes and traveling surcharges; their enrollment of employers as well as employees, etc., are no part of normal union performance.

[15] E. g., the Unions' price-fixing, travel regulations, employment quotas, licensing of booking agents, etc., have an extensive effect on market competition.

mains a §301 suit, and the jurisdiction of the Courts is no more destroyed by the fact that the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by a union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself." In antitrust lawsuits like the instant cases, plaintiffs should similarly be able to prove as Sherman Act violations what in other connections are or may be "unfair labor practices" because, in the total picture, they exhibit use of monopolistic power or constitute commercial restraints imposed by Unions in combination with non-labor groups; *e.g.,* closed shops, refusals to bargain as systematic Union policy and practice, coercion of employers into the same unions which organized said employers' employees. There is nothing to prevent the same acts from being both unfair labor practices under the NLRA *and* patterns of activity which in their context with other conduct are violative of antitrust laws; just as the same human act can be a crime and a tort under disparate legal definitions.

8. The record shows unmitigated commercial restraints and tyranny over the largest group of employers in the musical industry (i. e., orchestra-leader-employers), facilitated by Union combination with non-labor groups. That tyranny is constituted and maintained by the individual and cumulative causality or effect of the following items of long-standing Union conduct *in combination with non-labor groups:* (1) coercion of employers like plaintiffs into Union membership; (2) coercion of all employers in the industry to agree upon or to put into practice closed shops for all musician-employees; (3) imposition of minimum *price* regulations upon most employers in the industry; (4) dictation of forms of engagement contracts to be signed by leader-employers (including plaintiffs) and purchasers of music (the pub-

lic); (5) imposition on leader-employers of Union-established minimum-quota rules, whose terms are never the subject of any bargaining with anyone, since they are unilaterally originated by Union officers; (6) inclusion of leader-employer himself in the number allotted to each such employment quota; (7) grave curtailment of the right of employers like plaintiffs to travel across state lines for new business; (8) prohibition of competition with other leader-employers by numerous bylaws; (9) systematic refusal to bargain collectively with orchestra-leader-employers because such employers are Union members, subject to unilateral regulation by Union bylaws; (10) unilateral establishment of wages, hours and working conditions for most of the employers in the industry (including all leader-employers) without any dealing with them; (11) in some areas of the industry, Union requirements that customers of leader-employers pay wages owing to orchestra leaders' employees directly to the Local, which in turn pays the leaders' employees; (12) Union ban on lowering orchestra leaders' prices to the public, even when they fully pay the unilaterally fixed Union wage scales; (13) a total monopoly over the industry such as the Court of Appeals decision partially sketches; (14) the past imposition of unlawful exactions ("traveling surcharges" and "local taxes") upon orchestra leaders only; (15) unreasonable burdens on leaders of traveling orchestras; since such leaders constitute less than 5% of Union membership, but they were saddled with the duty of supplying *out of their own pockets* more than 60% of AFM revenues and also a substantial percentage of the revenues of Locals in whose jurisdictions said leaders traveled; (16) threats of strikes, boycotts, unfair lists and fines up to $5,000, to say nothing of expulsions, which mean for all practical purposes the end of a leader's musical career.

Few, if any, unions have ever before ventured, in combination with so many non-labor groups, upon such a thorough and extensive program of statutory violation, industry-wide commercial restraints and Union-official dictatorship over employer and employee members. As a matter of fundamental justice, defendant Unions should not, even under a most reasonably favorable view of their exemption from antitrust law liability, be permitted to dragoon an entire industry unilaterally and to make *ex parte* impositions upon most employers in that industry. Nor should Union officers be allowed such comprehensive power (as here exhibited)—unilaterally, without due process and without respect for elementary civil liberties—to terminate an orchestra-leader-employer's career.

9. The Court of Appeals' conclusions from *Hunt v. Crumboch,* 325 U. S. 829, neglect the fact that this 1945 case was largely negatived by the Taft-Hartley Act (1947) and the Landrum Griffin Act (1959). In 1945, the *Hunt* case supported the proposition that a "labor union's refusal to deal * * * [was] * * * exempt in the absence of a conspiracy with businessmen" because no statutory duty was then placed on unions to deal with employers. But that proposition surely lost validity when Congress enacted laws which forbid a "union's refusal to deal" with the very employer whose employees such unions purport to represent. Furthermore, a *combination* (as distinct from a *conspiracy*), such as exemplified in these cases, suffices for Sherman Act purposes. Nor is it true that "the purpose behind the union's action makes it apparent that there is no violation involved," as the Court of Appeals, relying on the *Hunt* case, held. The purpose of the Unions in all these practices was manifestly lawless and predatory. In any event, the cumulative *effect,* if not *purpose,* behind the Unions' con-

duct is clearly the elimination of non-union competitors (orchestra-leader-employers). A purpose or effect to achieve "uniformity of labor standards" in combination with non-labor groups does not excuse the Union conduct here challenged, especially when one considers the manner in which employers' rights and freedoms are unlawfully confiscated by defendant Unions in their ruthless reach for "uniformity." Such unlawfully coerced uniformity, at the price of such Union restraints upon the industry and the public, is purchased at too high a price. It would seem that the time has come to reverse or substantially qualify *Hunt v. Crumboch,* by considering the contrary pull of the duty to bargain, the duty to avoid closed shops, etc., placed on unions by 1947 and 1959 legislation, considered as interlacing with the Sherman Act, the Norris-LaGuardia Act and the NLRA. In *Hunt v. Crumboch,* 325 U. S. 821 (1945), the union's *refusal to admit the employers' employees to union membership* resulted in collapse of the employer's business. It was then held this did not constitute a violation of the antitrust laws. By contrast, in the instant cases, the Unions accept or coerce both employees and employers into membership and then purport to represent both. Local 802 acts as spokesman for plaintiffs' employees. At the same time it refuses to bargain with plaintiffs *as employers* precisely because plaintiffs are (coerced) members of AFM. Thus, the situation of the *Hunt* case is vastly different from that of the instant cases.

10. The argument made by defendant Unions is that there is "competition" (unproved in the record, but merely alleged there in general, conclusory language by Union officers) between orchestra-leader-employers and their subleaders and sidemen. The Union theory of "competition" between employers and their employees would mean that, throughout the entire structure of

American industry, practically all employers are in "competition" with their own employees. An employer or executive can scarcely be imagined who does not from time to time perform work which could be performed by employees. Top executives of the largest American corporations often do the very type of work which some employees can and do perform. Is it therefore to be concluded that top executives are in "competition" with their subordinates and their employees? Or that employers are in the "labor group?" No *specific* examples of such "competition" appear in the record.

It is no more true that, when a professional orchestra leader personally conducts his own orchestra, he displaces the services of a subleader, than it is true that an employer in the advertising industry displaces the services of one of his employees by writing copy which the employee is capable of writing.[16] On the contrary, the orchestra leader, who personally conducts his orchestra, far from displacing employees, actually makes their employment possible. Only by personally leading his orchestra is the leader-employer able to make for himself the type of reputation or demand which is the necessary precondition to his status as employer. The prestige of a band derives from the fact that it is the *employer-leader's* (Guy Lombardo's or Ben Cutler's or Joe Carroll's or Lester Lanin's) band; and that prestige, in most cases, depends on the leader-employer's occasional playing of some instrument.

Also, Unions neglect the record facts that (i) many times (especially when the number of musicians in an orchestra is eight or more), the leader-employer does

[16] The same can be said, *mutatis mutandis*, of many industries or professions: jewelers, architects, druggists, motion picture cartoonists, chemists, photographers, lawyers, doctors, store-keepers, manufacturers, painters, engineers, *et al.*

not use a musical instrument, but confines himself to his baton; (ii) an orchestra leader rarely if ever plays an instrument continuously while conducting his orchestra; and (iii) many leader-employers (like Peterson) never play an instrument, preferring to conduct only. Unions, for the convenience of their arguments in this connection, want orchestra leaders to deny or repudiate the very activity which brought them to positions as employer-leaders and which made them suppliers of jobs. Leaders conduct their orchestras by playing instruments in the peculiar way of leaders, a way which is not always instrumental virtuosity.

For two persons to be in competition, it is necessary for them to be in the same market or at least in the same market area. Orchestra leaders such as plaintiffs are not in the same market with their employees nor indeed with any sidemen or subleaders. Not one piece of record evidence puts them there. Defendants contented themselves with purely general statements to the effect that sometimes subleaders or sidemen played as orchestra leaders. (Of course, in doing this, they ceased being sidemen or subleaders and became leaders.) This is utterly inadequate to establish a relation of genuine competition. There was no evidence whatever to indicate that they were operating in the same market with identified employee-musicians-turned-employers.

No sideman or subleader *as such* competes with an orchestra-leader-employer. He must first become an orchestra leader to compete with orchestra-leader-employers. One may just as reasonably say that a jeweler working for Tiffany is in competition with the latter; or that a clerk in the A & P is in competition with Huntington Hartford; or a cub reporter is in competition with his publisher-editor.

A leader-employer, *qua employer,* cannot possibly compete[17] with his own employees for jobs or wages which he provides for them. Nor can he, *qua employer,* compete with his own employees for jobs and wages which they get from other orchestra-leader-employers, when they are not working for him. Insofar as some orchestra leaders seek employment as sidemen or as subleader from some other leader-employers, they do so as potential *employee-musicians* and not *qua employers.* Such employment of leader-employers-turned-employee-musicians is non-existent for plaintiffs Cutler, Carroll, Peterson, and many other orchestra leaders. Such a leader-turned-employee competes with sidemen or subleaders not *as an employer* but as an actual or potential employee-musician. Likewise when the sideman turns leader and looks for engagements *as leader,* he is not competing with orchestra-leader-employers *qua sideman* but *qua leader.* Thus, it is impossible for an orchestra-leader-employer, as such, to compete with his sideman

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[17] So loose was the Trial Court's use of the word "competition" that it can stand for many different things, not one of which is analysed or specifically asserted. It is never tied down to any of the eight possible objectives of competition covered by the District Court's equivocal formula:

(1) Competition in general between leader-employer and his own employees or other sidemen for musical engagements, where each strives as a general practice to be *the contracting party* with the same purchaser of the music.

(2) Competition between a leader-employer and an employee-musician for *a specific single or steady engagement.*

(3) Competition, in general, between leader-employers and employee-musicians for *status as orchestra leaders.*

(4) Competition between leader-employer and employee-musicians for *status as orchestra leader in respect of specific musical engagements.*

(5) Competition, in general, between leader-employers and employee-musicians, for *jobs as sidemen or subleaders.*

(6) Competition between leader-employer and employee-musicians for *jobs as sideman or subleader in a specific orchestra to perform a specific musical engagement.*

(7) Competition between leader-employers and employee-musicians for *the wages of sideman or subleader.*

(8) Competition between orchestra leaders and employee-musicians for *the wages of orchestra leaders in the relatively few cases where the latter are employees.*

There is no specific evidence in the record which supports any of the "competitions" identified above.

for jobs; since his musicians *as sidemen* never look for engagement contracts with purchasers of music. Similarly an employer, as such, cannot possibly compete with his own employees for jobs. Nor can he as *an employer* compete with any employee for jobs. He can only compete with employees for jobs by himself first seeking to become an employee; thus deserting his status as an employer. Sidemen are not substitutable for professional orchestra leaders.

The dictum about "economic relationship of any kind" from this Court's decision in the *Los Angeles Meat Drivers* case was based on an unrealistic stipulation of fact that there was no "job or wage competition or economic relationship of any kind between the grease peddlers and other members of the appellant union." That *dictum,* in its full literal scope, is not supported by the holding of any case.[18] Moreover that *dictum,* taken literally, is necessarily as vague as the word, "relationship" or "relation." The dictum proves too much and too little: too much because it would spell the end of the *Allen-Bradley* doctrine, recently reaffirmed by *Pennington;* too little because we have no bench marks to measure a reasonable ambit for the indefinable key word: "relationship."

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[18] "Labor Unions and Antitrust" by Meltzer in *The University of Chicago Law Review,* Vol. 33 at pp. 683-684:

"The reason for the Court's emphasis on the alleged lack of any economic interrelationship between the peddlers and the processors' employees is not wholly clear. That emphasis seemed to be related to the Court's recognition that in some cases unions may legitimately organize ostensibly independent contractors who are functionally employees. But in such cases appropriate characterization would appear to depend on the functional role of the disputed group and not solely on whether the disputed group competes with individuals who are employees. Thus, the Court's emphasis implies that if the missing economic interrelationship between the two groups had been found to exist, it would have been permissible for the union to cartellize the peddlers even though they had properly been characterized as 'independent contractors' rather than employees.

"The basis for that position appears to be that businessmen-workers, such as the peddlers, are directly substitutable for unionized employees and, accordingly, that the organization of the businessmen is necessary for preserving union standards applicable to employees.

11. A free-market, private-enterprise system has its most reliable balancing factors in free competition and free entry for everybody into the market. Defendant Unions in combination with non-labor groups prevent free competition and free entry by the cumulative efficiency of their numerous commercial restraints. Together with conniving or harassed businessmen, like leader-employers, defendant Unions have established cost structures and price levels for leaders and the public which the courts and administrative agencies are asked to take as *data* for the industry or as the natural law thereof. Unions should not be permitted in this way to present plaintiffs, the public and the courts with *faits accomplis.*

Unions are no different from other human institutions in an area like labor relations where the law largely allows the parties to be guided by their own views of self-

(Footnote continued.)

"An appealing argument could thus be made for permitting unions to regulate the prices, hours, etc. of businessmen who are directly substitutable for unionized employees and who could be wholly excluded from dealing with unionized firms.

"There are, however, weighty opposing considerations. Such unionization collides with the tradition of 'encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power.' The Taft-Hartley Act responded to that tradition by seeking to limit situations in which 'independent contractors' were classified as 'employees' and by proscribing union pressures designed to force the self-employed into unions. To read the Sherman Act to give a more expansive reach to 'employees' than was provided for by Taft-Hartley would be inconsistent with the purpose reflected in the latter statute. Such a reading would, moreover, be paradoxical in that it would disregard that the objective of the Sherman Act is to limit concerted activities by businessmen, while the objective of Taft-Hartley is to protect concerted activities by 'employees.' Under such circumstances it would be strange indeed to have a broader definition of 'employees' under the Sherman Act than under Taft-Hartley. Furthermore, the interdiction of price fixing by businessmen-workers would operate, albeit modestly, as a check on union power. Indeed, the resultant check would not be essentially different from that provided by large firms offering products or services that could be economically substituted for unionized labor. Thus, the logical implication of the argument for union cartellization of businessmen-workers is that the union should be able to cartellize and fix prices of firms whose output may erode union standards. Finally, cartellization of businessmen-workers may be designed to and may operate to provide monopoly gains to businessmen rather than to protect the integrity of union standards." S. Meltzer; *ibid.* (pp. 684-685).

interest. From a legal, moral or economic aspect unions are not good *per se*. Their valuation depends upon the moral, legal and economic judgments and policies of their officers and members. Justice is a *human* virtue, not really that of an institution or instrument like a union or an employer association. Collective bargaining was designed to balance union acquisitiveness and self-interest to protect not only the employer but more importantly the public. The balancing effect of collective bargaining has never been exerted under the long AFM regime, where the largest number of employers (orchestra leaders), who employ the largest number of musicians, have been systematically denied the right to be heard at the bargaining table.* This has meant (because of the AFM dictatorship) that significant moral, legal and economic judgments for the industry and its public (including purchasers of music) have been made largely by union officials and, occasionally, by employee musicians, without the checks and balances provided by bargaining with leader-employers. The latter's attendance at price-list meetings, where it is permitted, is meaningless, since employee musicians can and do always out-vote them. Nor, especially in the light of Union bylaws and other circumstances described in the record, is collective bargaining allowed half a chance where the involved employers are forced into or voluntarily sign up with Unions, thus subjecting themselves to Union bylaws unilaterally made by Union officers and enforced by Unions in combination with many non-labor groups. It is incongruous, in view of the usual patterns of industrial relations, that employers should be active members of the same Union which purports to represent their employees. Furthermore, collective bargaining is generally not a wealth-creating but rather a wealth-distributing process. Defendant Unions, by their commercial restraints in com-

* See 164 N.L.R.B. No. 8 concerning orchestra leader Cutler and 165 N.L.R.B. No. 110 *re* orchestra leaders Doerner and Glasser.

bination with labor groups, *unilaterally* regulate, meddlesomely interfere with and dominate *both* the wealth-creating process by which leaders get engagements providing jobs for employee-musicians and the orchestra leader's process of distributing wages among employee-musicians. In these interferences, defendant Unions are aided by their control over and combination with booking agents, hotels, nightclubs, restaurants, dance-hall operators and those orchestra-leader-*employers* who collaborate with said Unions and who either welcome or do not object to the involved commercial restraints. Many of the latter enjoy being protected from competition by the Unions.

12. The Court below seemed (with one exception, p. 163, where it stated the rule of *Allen-Bradley*) to emphasize repeatedly (pp. 163-164, 165, 167) the need for a *conspiracy* rather than a *combination*. Since the Sherman Act can be violated by a contract, combination *or* conspiracy, said emphasis creates a precedent which is in principle erroneous. The statute and case law make no distinction respecting *who* originates the contract, combination or conspiracy or *when*. In reason, it should not matter who initiates the vehicle (contract, combination *or* conspiracy) for commercial restraint under the *Allen-Bradley* line of cases. As long as Union and employers combine to impose the restraint, the *Allen-Bradley* rule should apply. The alternative is *carte blanche* to all such combinations, and aggrandizement of already swollen union power.

13. Judge Friendly, in discussing the various shades of involvement in the musical industry of different orchestra leaders makes much of the wide "spectrum" of their attachment to their profession. He, and sometimes the majority, neglect the indisputable fact that *plaintiffs* and leader-*employers* like them, constituting something less than 2% of AFM members, are full-time, professional

orchestra-leader-*employers* who never or who very rarely work as employee musicians; and who—all of them—earn their livelihoods from their profession. About 90% of all "orchestra leaders" exhibit little participation in the industry. (No plaintiff is in that group.) The engagement contracts, filed by this 90% with AFM locals, are for performances as leaders less than 10 times in 9 months (Defendants', Exhibits L and M). Such "orchestra leaders" usually play as *employee* musicians and by profession are sidemen, not professional orchestra leaders. Plaintiffs and the relatively few leader employers like them should not be put in the same category with such occasional "orchestra leaders."

14. Under no authoritative theory of labor jurisprudence, is *coercion of employers into the same union which represents their employees defensible.* The interests of leader-employers are quite different from those of sidemen (508, 3657, 3659, 3666-67). Recently leader-employers were for the first time excluded from Local 802 Price List meetings precisely because they were employers (Plaintiffs' Exhibit 219). An employer member of the Unions cannot properly or successfully sit on both sides of the bargaining table. He cannot practically (or lawfully in New York[19]) act as a union officer (508, 1950-51; 2497-98, 3498, 3657). In those AFM Locals where employers are allowed to participate in discussions of wages and prices, the leader is always outnumbered and outvoted (1950-51, 2497-98, 3498). Defendant Unions place upon leader-employers duties and burdens which are more onerous than those placed on members who are employee-musicians. Leader-employers are expected to pay more work-dues, to pay welfare contributions, to file reports, etc. (Sidemen-members are required to do none of these things.) At best, leader-employers are second-class Union members, treated as such by Union officers.

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[19] Labor Law: Article 20-A, Section 723(1)(a). See footnote 11, *supra.*

15. Antitrust suits against AFM and its Locals have already been filed or will be filed by orchestra-leader-employers and others in Chicago, Boston, Kansas City, Los Angeles and other places. All of them ask for the comprehensive relief sought by plaintiffs-respondents here. An equally comprehensive treatment of all of the issues raised by the complaint here will doubtlessly obviate the need for a multiplicity of suits to curb AFM pretensions to dictatorship over the musical industry in combination with non-labor groups. The Form B contract,[20] on its face and in practice largely a means used by defendants for price-fixing, is one of the chief targets.

16. Numerous AFM bylaws place unreasonable restrictions on interstate commerce, especially when they are considered cumulatively. Those bylaws are admittedly enforced as they are written (8, 21, 25-26, 35, 64, 151-2).

17. The existence of a class of orchestra-leader-employers cannot be denied. It was presupposed by the Trial Court and by the Court of Appeals in the texts of their opinions. It is constantly presupposed by AFM and Local bylaws and practices, which sharply differentiate between leaders and sidemen (Plaintiffs' Exhibit 219).

The record facts show that the Union conduct challenged by the complaint is dictated by a generalized Union policy of antitrust violations in combination with non-labor groups. The Unions have enforced and, upon past showing, intend vigorously to enforce this policy through an efficiently developed system of policing all musical engagements performed within their geographical

[20] It deserves notice that the AFM-required form was somehow discarded by Local 802, which, despite (and without amending) AFM and Local bylaws making the AFM bylaws binding on Locals, replaced the Form B in May, 1967, with a new engagement contract form to be found in Appendix C. It demonstrates that despite the Court of Appeals' condemnation of AFM price fixing, that activity and Union regimentation in combination with employers still goes on apace.

jurisdictions. The Unions' generalized policies involve a *group* always and necessarily recognized as such now called "leader-employers." As Appendix C shows, all members of this group are expected by Unions to sign contracts, etc. Under the doctrine of *NLRB v. International Union of Operating Engineers, Local 571,* 317 F. 2d 638, 643-44 (C.A. 8) and the authorities cited in that case: "the Board is justified in broadening its order to include similar unlawful practices if there is evidence in the record of some general scheme or design or proclivity for such unlawful practices."

A similar rationale should apply to courts under Rule 23 of the Federal Rules of Civil Practice, regardless of the acuities and refinements of judicial construction concerning "spurious class" action, etc. It was not even possible for the Courts below to discuss the record facts in these cases without referring, time and again, to a real *class of leader-employers;* i. e., professional orchestra leaders.

Conclusion.

For the foregoing reasons this cross-petition for a writ of certiorari should be granted.

Dated: New York, N. Y., June 29, 1967.

Respectfully submitted,

Attorney for Plaintiffs-Respondents.

APPENDIX A.

SHERMAN ANTI-TRUST ACT

26 Stat. 209, 15 U.S.C., Secs. 1 and 2
(approved July 2, 1890)

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B.

NORRIS-LaGUARDIA ACT

47 Stat. 90, 29 U.S.C., Sec. 101
(approved March 23, 1932)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

APPENDIX C.

In May, 1967, Local 802 replaced the Form B contract with the following form which its Executive Board now imperates for use by all "Leader-Employers." It indicates, by the italicized language (not emphasized in the original), Union continuance of price fixing:

AGREEMENT made the day of , 196 , by and between of (Herein called the "Leader-Employer") and the ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, A. F. of M. (herein called the "Union").

WHEREAS, the Leader-Employer is desirous of employing members of the Union for musical performances in the single engagement field, and the Union is willing to have its members work for the Leader-Employer on the payment to them of applicable Union wage scales and the compliance by the Leader-Employer of all applicable Union rules and regulations, as well as of the terms set forth below.

NOW, THEREFORE, in consideration of the premises, it is agreed as follows:

1. The Leader-Employer will notify the Union in writing, within days after entering into any contract with a client or purchaser of music for the performance of music in the single engagement field, of the date, time and place of such engagement, and the number of musicians, including the Leader who will be performing on the engagement.

2. *The Leader-Employer warrants* that any such contract which he will enter into will provide for—

(a) *Sufficient monies to be paid by the client or purchaser of music, so that each musician performing on the engagement, including the Leader, will be paid at least the current minimum wage scales* required by Article X of the Local 802 By-Laws applicable to the particular engagement for the hours to be worked and any extras provided for in the contract.

(b) *Sufficient monies for the specific payment of One Dollar ($1.00) for each musician* performing on the engagement, *including the Leader, as contributions to the Local 802 Musical Engagements Welfare Fund.* The Leader-Employer agrees that he will be responsible for the collection and payment of these contributions to the said Welfare Fund; and he further agrees to be bound by the terms of the Agreement and Declaration of Trust made the 22nd day of April, 1954, between the Hotel Men's Committee for Hotel Users of Music, the Restaurant League of New York, the Associated Musicians of Greater New York, Local 802, and the Trustees of the said Fund, as amended.

(c) *Sufficient monies to be paid by the client or purchaser of music to cover the costs of Unemployment Insurance, Social Security, New York State Disability Benefits Insurance and Workmen's Compensation* for each musician performing on the engagement.

3. The Leader-Employer will supply to the Union, on forms to be supplied by the Union, the name, card number and scale earnings of each musician who performed on the engagement. Such forms, together with the required payments to the Welfare Fund, will be returned within fourteen (14) days after they have been mailed

by the Union. If the Leader-Employer has authorizations from the musicians to do so, he will also forward with this form payment of the Union's work dues checked-off from their earnings.

Dated, 196 .

Leader-Employer

ASSOCIATED MUSICIANS OF GREATER NEW YORK,
Local 802, A. F. of M.

LOUIS CRITELLI, Secretary
Local 802, A. F. of M.